IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Civil Writ Petition No.7132 of 2005

Laxmibai Ramji Shah & ors. Petitioners

Vs.
Khimji Palan & ors. Respondents

Mr.Milind Parab i/b. Mr.B.M.Purandare for petitioners.

Mr.A.K.Abhyankar, Sr.Counsel with Mr.Nitin Mhatre for resp.nos. 2(a) to 2(e), 3(a) to 3(c), 4 and 5.

CORAM: B.H.MARLAPALLE, J.

April 19, 2007.

P.C.

. Heard the learned counsel for the petitioners - plaintiffs in RAE Suit No.977/5207 of 1976. The said suit came to be dismissed by the learned Judge of the Small Causes Court at Mumbai under the provisions of Order IX Rule 5 of CPC. Consequently Misc. Notice No.1038 of 1999 was taken out for restoration of the suit and the notice has been dismissed on 14/2/2002 by the learned Judge of the trial Court. The said order came to be challenged in Appeal No.362 of 2002 before the Division Bench of the Small Causes Court and the said appeal was also dismissed both as not maintainable as well as on merits by the judgment and order dated 11/4/2005.

. Once the lower Appellate Court recorded a finding that the appeal was not maintainable, it ought to have stopped there itself rather than proceeding further and recording a reasoned order on merits. In this petition the challenge to the order dated 14/2/2002 in dismissing Misc. Notice No.1038 of 1999 is, therefore, required to be examined on merits and without taking into consideration the reasons therefor recorded by the lower Appellate Court.

. The learned Judge of the trial Court noted that the suit was filed in the year 1976 and for a long period of 23 years the plaintiffs could not take steps to serve the summons. The learned Judge of the trial Court dismissing the suit on 6/12/1999 had observed as under:

> "Plaintiff and advocate are not present. Only defendant no.2 present. The plaintiffs have not taken steps since long. No cost paid, hence suit dismissed for want of compliance. Thus the suit is dismissed under Order 9 Rule 5 of Code of Civil Procedure."

. It was, therefore, observed by the trial Court that the applicants had failed to show reasonable cause for their failure to comply with the service of summons, payment of costs or any other deficiencies. The justification submitted by the applicants that on account of demise of both the plaintiffs nobody could remain present before the Court, though the applicants were aware about filing of the suit, was not found to be acceptable, more so when it was clear from the record that the applicants themselves had taken out Notice No.3175 of 1992 to bring them on record as Trustees of the plaintiff - Trust. In addition, when the suit is dismissed under Order IX Rule 5 of CPC, the plaintiff has a remedy to bring a fresh suit subject to the law of limitations and, therefore, in the instant case such a remedy was open to the applicants and not to prefer an application for setting aside the order dated 6/12/1999. Under such circumstances, the view taken by the trial Court in rejecting the application cannot be termed as perverse or grossly erroneous so as to cause interference under Article 227 of the Constitution. Even otherwise if there is a fresh cause of action,

nothing stops the plaintiffs from moving a fresh suit

subject to the law of limitations.

. Hence the petition is rejected summarily.

(B.H.MARL